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YAYASAN PELAJARAN BAHAGIAN PERTAMA SARAWAK

v.

LIM TECK HAI & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[ORIGINATING SUMMONS NO: 24-102-2003-III (II)]
28 NOVEMBER 2005

C

CIVIL PROCEDURE: *Summary proceedings - Possession of land - Rules of the High Court 1980, O. 89 - Whether applicable - Whether defendants' occupation of concerned portions on lands with licence or consent - Whether a triable issue was raised - Whether there was an abuse* D *of the process of the court - Whether originating summons to be converted into writ action*

The plaintiff, Yayasan Pelajaran Bahagian Pertama, Sarawak, a registered society, was the registered proprietor of all the parcels of land situated at Badruddin Road, Kuching. *Vide* originating E summons dated 3 April 2003, the plaintiff applied for possession of the said lands pursuant to O. 89 of the Rules of the High Court 1980 ('the RHC'). The facts were that the plaintiff purchased the lands in dispute sometime in 1986 as per exhs. CSH11 to 20, copies of the memorandum of transfer evidencing F the transfer of the said lands from the Hokkien Association, Kuching to the plaintiff. Exhibition CSH21 exhibited by the plaintiff was a plan showing the location of several dwelling houses. The plaintiff argued that the defendants did not have any licence or consent from the plaintiff whether to enter into or to remain in G occupation of the portion concerned of the said lands. The defendants, however, adduced evidence to show that they had the right to occupy the portions concerned on the said lands. On 13 June 2005, the court found there was conflicting evidence and ruled that there was a triable issue which made the summary H procedure under O. 89 of the RHC inappropriate. The issue for the court's determination was whether the originating summons could be converted into a writ action since the court had found that there was a triable issue. The defendants herein contended that the originating summons should be dismissed on the grounds I that (1) the mode selected by the plaintiff to commence the proceedings was *ab inito* known to be unsuitable and was an abuse of the process of the court; (2) the plaintiff had prior

knowledge of the defendants' presence on the said lands; (3) plaintiff's failure to comply with the preconditions for O. 89 of the RHC since there was no proof that the defendants did not have the licence or consent of its predecessors and (4) plaintiff's action was time barred and their rights against the defendants were extinguished by virtue of s.26 read with s. 3 of the Limitation Ordinance (Cap 49) (Sarawak) ('Ordinance') and Items 103, 105 and/or 112 of the Schedule of the same Ordinance.

Held (converting originating summons into a writ action and all affidavits be treated as pleadings):

(1) This court found the contention of the defendants that the plaintiff had prior knowledge of the defendants' presence unsustainable. The contention with respect to the purchase of the said lands by the plaintiff was for gross under market value and with notice of the defendants' rights could not be entertained because as submitted by the plaintiff, it transcended into the realm of speculation. As for the contention of non-compliance of pre-conditions of O. 89 of the RHC, it was a matter dealt with on 13 June 2005. (paras 15, 16 & 17)

(2) Item 103 of the Schedule of the Limitation Ordinance was not applicable to the instant case as it regulates property purchased from trustee, mortgagee or chargee. Item 105 provides that the period of limitation for a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale was 12 years from the time the vendor was first entitled to possession. Here, the vendor was Hokkien Association which was the predecessor in title of the plaintiff. However, this court disagreed with the plaintiff's submission that no evidence had been produced by the defendants to show that the Hokkien Association had given the defendants any licence to occupy the said lands. The defendants have adduced evidence regarding the deed of transfer supporting their right to occupy the concerned portions on the said lands. On the other hand, the plaintiff stated they had no knowledge. Hence, the issue of whether the defendants' occupation of the concerned portions on the said lands was with the licence or consent of the predecessor in title became a triable issue. (para 18)

(3) Item 112 of the Ordinance provides that for a suit for possession of immovable property or any interest not specifically provided for, the limitation period will be 12 years from the date the possession of the defendant became adverse to the plaintiff. Here, since the plaintiff and the defendant hold differing views as to the law applicable, it was a matter which was best argued at the trial proper. There was no abuse of the court's process on the part of the plaintiff in instituting the originating summons as to warrant the court to dismiss the action. The court ordered the originating summons to be converted into a writ action and all affidavits be treated as pleadings. (para 19)

Case(s) referred to:

Salim Ismail & Lain-lain lwn. Lebbey Sdn Bhd (No 2) [1997] 1 CLJ 102 CA ***(refd)***

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***

Lim Nyit Loong v. Occupier(s) of TB3783 Taman Pasadena, Tawau & Person(s) Unknown [1995] 4 CLJ 245 HC ***(refd)***

Tekad Urus Sdn Bhd (sebagai wakil kuasa kepada KCSB Konsertium Sdn Bhd) v. Penduduk-penduduk yang menduduki kawasan yang dipanggil Desa Perwira yang terkandung di atas sebahagian tanah yang dipegang di bawah hakmilik dikenali sebagai Lot 1867, Pajakan No. 648 Mukim Plentong, Daerah Johor Bahru, Negeri Johor dan 128 Lagi [2004] 4 CLJ 516 CA ***(refd)***

Yap Hong Thin & Anor v. Seenevasam [1970] 1 MLJ 143 ***(refd)***

Legislation referred to:

Limitation Ordinance (Sarawak) (Cap 49), ss. 3, 26, Sch. Items 103, 105, 112

Rules of the High Court 1980, O. 89 r. 1

For the plaintiff - Alvin Yong; M/s Tan Yap & Tang
For the defendants - Dominique Ng; M/s Dominique & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

Background

[1] The plaintiff, Yayasan Pelajaran Bahagian Pertama, Sarawak, a registered society is the registered proprietor of all the parcels of land situated at Badruddin Road, Kuching and described as Lots 63, 64, 66, 67, 68, 69, 70, 71, 72 and 73 all of Section 20 Kuching Town Land District (hereinafter collectively referred to as "the said lands") as is evident from the copy of the print-out title issued by the Land and Survey Department Sarawak, Kuching, exhs. CSH1 to CSH10 respectively. *Vide* originating summons dated 3 April 2003, the plaintiff applied for possession of the said lands pursuant to O. 89 of the Rules of the High Court 1980 ("the RHC").

[2] On 13 June 2005, I had ruled that the defendants have raised an arguable issue which made the summary procedure under O. 89 of the RHC inappropriate. I had allowed the parties time to submit with regard to the issue of whether O. 28 of the RHC is applicable to convert the originating summons into a writ action since parties wished to undertake some research. The matter was adjourned for hearing on 29 September 2005.

Contentions Of Counsel

[3] On 29 September 2005, learned counsel for the plaintiff, Mr. Alvin Yong referred to two (2) Court of Appeal cases which showed that an originating summons under O. 89 of the RHC was converted into a writ action namely:

(a) *Salim bin Ismail & Lain-lain lwn. Lebbey Sdn Bhd (No 2)* [1997] MLJ 4 at pp. 6 and 10.

(b) *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127.

[4] On the other hand, apart from citing *Cheow Chew Khoon*'s case *(supra)*, Mr. Dominique Ng, learned counsel for the defendants had referred the court to:

(a) *Tekad Urus Sdn Bhd (sebagai wakil kuasa kepada KCSB Konsertium Sdn Bhd) v. Penduduk-penduduk yang menduduki kawasan yang dipanggil Desa Perwira yang terkandung di atas*

A *sebahagian tanah yang dipegang di bawah hakmilik dikenali sebagai Lot 1867, Pajakan No. 648 Mukim Plentong, Daerah Johor Bahru, Negeri Johor dan 128 lagi* [2004] 4 CLJ 516.

(b) *Yap Hong Thin & Anor v. Seenevasam* [1970] 1 MLJ 143.

B (c) *Lim Nyit Loong v. Occupier(s) of TB3783 Taman Pasadena, Tawau & Person(s) Unknown* [1995] 4 CLJ 245.

Further, the learned counsel for the defendants was urging the court to adopt the approach advocated by Gopal Sri Ram JCA in C *Cheow Chew Khoon*'s case *(supra)* on the ground that the originating summons should be dismissed and not be converted into a writ action because the mode selected by the plaintiff to commence the proceedings was *ab initio* known to be unsuitable and it was an abuse of the court's process. The grounds upon which the D defendants submitted the originating summons should be dismissed basically are:

(i) The plaintiff had prior knowledge of the defendants' presence on the said lands since the plaintiff acquired them sometime in E 1986 whereas the defendants had been staying there since 1910. Plaintiff even submitted that following *Lim Nyit Loong*'s case *(supra)* there was some cooperation between the plaintiff with the Hokkien Association if one was to look at the purchase price that plaintiff paid for the said lands, being F RM300,000 as evident from exh. CSH11 to exh. 20 as compared to RM1,618,400 the valuation sum stated by the Land and Survey Department implying the purchase price was grossly undervalued.

G (ii) Plaintiff's failure to comply with the pre-conditions for O. 89 of the RHC since there is no proof that the defendants did not have the licence or consent of its predecessors in title ie, the Hokkien Association, Kuching to enter/remain in occupation of the said lands.

H (iii) Plaintiff's action is time barred and their rights against the defendants are now extinguished by virtue of s. 26 read with s. 3 of the Limitation Ordinance (Sarawak Cap. 49) and Items 103, 105 and/or 112 of the Schedule of the same Ordinance.

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Decision

[5] The issue for the court's determination is whether the originating summons can be converted into a writ action since the court has found there is a triable issue. The correct approach to be taken has been duly recognised by Ian Chin J in *Lim Nyit Loong*'s case *(supra)*, a case where the plaintiff entered into an agreement with the developer to buy a house and later realised that it was occupied by persons unknown to him and the plaintiff applied to the court under O. 89 of the RHC for possession of the house when the occupiers refused to vacate the house upon being requested to do so. Having found that the disputes and the facts of the case fall outside the scope of O. 89 r. 1 of the RHC, Ian Chin J was faced with the question of either dismissing the action outright or order the proceeding to be converted into a writ with the necessary directions. In this regard Ian Chin J dismissed the action upon adopting the principle enunciated in *Cheow Chew Khoon*'s case *(supra)* that it is the discretion of the trial judge after hearing the originating summons to make the appropriate order. As to the exercise of discretion, His Lordship referred to the dicta of Gopal Sri Ram JCA at p. 143:

> There is absolutely no doubt that he may, generally speaking, exercise the power under r. 8(1) of O. 28 where it appears to him that *via voce* evidence is required to decide upon factual disputes for the determination of which the originating summons procedure is manifestly unsuitable. Equally, he may, in an appropriate case, dismiss the summons and leave the plaintiff to commence an action by writ. Cases in which a dismissal may be appropriate include those in which it is patent upon the face of the summons or the affidavit in its support that the complaints raised cannot but be tried in a writ action. The plaintiff, in such a case as that alluded to, must be taken to know ab initio that the mode he selected to commence the proceedings was manifestly unsuitable.

[6] Further, the case of *Salim (supra)* and *Tekad Urus Sdn Bhd (supra)* similarly confirmed the judicial trend that it is an exercise of the court's discretion whether to dismiss the action or to convert the originating summons made pursuant to O. 89 r. 1 of the RHC into a writ action.

[7] In *Salim*'s case, the then Ahmad Fairuz JCA (now CJ Malaysia) opined at p. 108:

A Berteraskan kepada autoriti-autoriti tersebut di atas dan fakta-fakta yang terdapat di dalam afidavit-affidavit perayu-perayu dan penentang, nyatalah bahawa perayu-perayu – jika tidak diberi kebenaran oleh kerajaan negeri bagi menduduki tanah itu – telah melakukan kesalahan di bawah s. 425(1) Kanun Tanah Negara 1965 ('KTN'), iaitu kesalahan menduduki secara haram di atas tanah kerajaan dan perayu-perayu bolehlah didenda tidak melebihi RM10,000 atau dipenjara selama tidak melebihi satu tahun. Walau bagaimana pun, jabatan-jabatan dan agensi-agensi kerajaan telah memberi mereka kemudahan-kemudahan seperti bekalan air, elektrik, telefon dan sebagainya. Malahan pihak pegawai daerah yang sepatutnya melaksanakan undang-undang di bawah KTN, antara lain, telah memberi izin kepada perayu-perayu untuk membina semula rumah-rumah mereka yang telah terbakar. Dengan adanya keterangan-keterangan sedemikian rupa, timbullah isu sama ada tindak-tanduk agensi-agensi kerajaan itu boleh ditafsirkan sebagai kebenaran kerajaan negeri. Ini adalah isu yang boleh dibicarakan. Kerana itu, tatacara di bawah A. 89 ini adalah tidak sesuai digunakan oleh penentang. Justeru itu, mahkamah ini telah membenarkan rayuan perayu-perayu dengan kos di sini dan di Mahkamah Tinggi. Mahkamah ini juga mengarahkan supaya sama pemula itu dijadikan suatu tindakan writ dan semua afidavit-afidavit disifatkan sebagai pliding-pliding dengan kebebasan memohon arahan-arahan selanjutnya daripada mahkamah bawahan.

[8] In *Tekad Urus Sdn. Bhd. (supra)* Alauddin b. Mohd. Sheriff, JCA (as he then was) in delivering the judgment of the Court of Appeal said:

> The learned judge therefore concluded that there were issues to be tried and that this was not a suitable case to be decided by affidavit evidence. This is not a fit and proper case to be dealt with summarily under Order 89 RHC. He therefore dismissed the appellant's application.
>
> Based on all the affidavit evidence available before him and the reasons advanced by the learned judge, we find that there is nothing wrong with his decision to dismiss the appellant's application.

It is to be observed that His Lordship supported the aforesaid dicta by following the decision in *Salim bin Ismail (supra)*.

[9] Having established the applicable principles to be adhered to, I now turn to the facts in the instant case. It is correct that the plaintiff purchased the lands in dispute sometime in 1986 as per exhs. CSH11 to CSH20, copies of the Memorandum of Transfer evidencing the transfer of the said lands from the Hokkien

Association, Kuching to the plaintiff. Exhibit CSH21 exhibited by the plaintiff is a plan showing the location of several dwelling houses which is shaded in pink located on the said lands. One of the dwelling houses bears the name of Hiu Hung Joo. Khoo Nyet Choon @ Hiu Ngiat Chun (f) deposed that she is the sister of the late Hiu Bak Yong (defendant no. 6), aunty to Khoo Han Kheng (f) (defendant no. 3), Hiu Hung Joo (defendant no. 5) and Kho Hun Poh (defendant no. 7) all of whom are children of the late defendant no. 6, whilst Rimeb ak Risong (f) (defendant no. 4) is the wife of Khoo Han Sing another son of the late defendant no. 6. Khoo Nyet Choon further deposed that her family has been staying at 512, (Lot 67) Jalan Badruddin, 93400 Kuching, ie, on the said lands claimed by the plaintiff ever since the 1910s and there were about 5 to 6 houses there originally acquired at between RM600 to RM800 (Sarawak dollars) with duly registered deeds of transfer and her late father had purchased their house and land for RM800 as is evident by exh. KNC3, a copy of the deed of transfer which showed that it was purchased on 11th day of Ichi-gatsu 2605 which was translated to mean 11 November 1945 (this date is undisputed).

[10] Bong Jee Thiam, is the husband of Anna Soon (f) (defendant no. 9) and the grandson of Voon Jee Shin (sometimes spelt as "Bong" or "Vong") (defendant no. 8). He deposed that his address 602 (Lot 71) Jalan Badruddin, 93400 Kuching is located on the said land claimed by the plaintiff and the house and land was purchased by his grandfather for RM800 (Sarawak dollars) from one Lai, the son-in-law of a butcher who had stayed there for more than 10 years (about the end of 1930 and early 1937) deposed that the deed of transfer of the said house was unfortunately burnt by mistake by the family after his father passed away in 1990.

[11] Notwithstanding the absence of the deed of transfer, he deposed that they had been paying the council assessment rates till now and produced a copy of an old Assessment Notice issued by the Kuching Municipal Council dated 29 January 1980, exh. BJT4A and the latest Assessment Notice dated 19 March 2003, exh. BJT4B. He had confirmed that the address 602, Hokkien Road is the same as 602, Jalan Badruddin which was not disputed by the plaintiff. In addition, he deposed that they had proper water and electricity supply and produced exhs. BJT5A and BJT5B, SESCO bills dated 8 May 2003 and 12 March 1996 respectively. This evidence remains unrebutted.

[12] I had made a finding on 13 June 2005 that for the purpose of O. 89 r. 1 of the RHC, the plaintiff need not prove that the persons in occupation must be "without licence or consent of any predecessor in title of his"; it is sufficient if the plaintiff prove that the defendants were occupying the said lands without the plaintiff's permission or consent because of the wording of O. 89 r. 1 of the RHC which reads:

> without his (Plaintiff's') licence or consent or that of any predecessor in title.

This is because of the word "or" which implies that the phrase is to be read disjunctively. The plaintiff had adduced evidence that the defendants did not have any licence or consent from the plaintiff whether to enter into or to remain in occupation of the portion concerned of the said lands and the plaintiff averred that they have no knowledge whether the occupation of the said lands by defendant no. 2 to defendant no. 9 (Defendant No. 1 is no longer relevant in this proceeding because he had conceded to the plaintiff's application and order in terms was granted on 12 May 2004) was with the licence or with the consent of the Hokkien Association, Kuching.

[13] In fact the plaintiff had averred that apart from defendant no. 2 to defendant no. 9, the plaintiff did not know the names of any other persons or have knowledge when they came to occupy of the concerned portions in the said lands. It was then that the defendants adduced evidence to show that they had the right to occupy the portions concerned on the said lands, as I have alluded to above; and I had found that there is conflicting evidence and ruled that there is a triable issue.

[14] Subsequently, all the current occupants and/or owners of the houses on the said lands declared their desire to be joined as defendants and they are listed in exh. BJT6. This evidence only surfaced during the hearing of the plaintiff's application on 14 August 2004.

[15] It is appropriate at this juncture to refer to the rationale behind the introduction of O. 89 of the RHC. Gopal Sri Ram JCA in *Cheow Chew Khoon*'s case *(supra)* had stated that O. 89 of the RHC is "[A] summary procedure meant primarily for the eviction of squatters. For, it frequently happens that land or even a building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To

require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute the imposition of an intolerable burden upon him. It is to meet this problem that the rules committee passed O. 89". Bearing in mind the dictum of Gopal Sri Ram JCA, in the light of the aforesaid evidence, I find the contention of the defendants that the plaintiff had prior knowledge of the defendants' presence is unsustainable.

[16] The second contention with respect to the purchase of the said lands by the plaintiff was for gross under market value and with notice of the defendants' rights, in my view, cannot be entertained by this court because as submitted by the learned counsel for the plaintiff, it transcends into the realm of speculation.

[17] As to the third contention of non-compliance of pre-conditions of O. 89 of the RHC, it is a matter which I have dealt with on 13 June 2005.

[18] Lastly, the fourth contention of the defendants is that the plaintiff's action is barred by Items 103, 105 and 112 of the Schedule of the Limitation Ordinance.

I agree with what learned counsel for the plaintiff submitted that Item 103 is not applicable to the instant case as it regulates property purchased from trustee, mortgagee or chargee.

I also agree with the learned plaintiff counsel that Item 105 provides that the period of limitation for a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale is 12 years from the time the vendor is first entitled to possession. In the present case, the Vendor will be the Hokkien Association, Kuching which is the predecessor in title of the plaintiff. However, with due respect to the learned counsel for the plaintiff, I cannot agree with his submission that no evidence has been produced by the defendants to show that the Hokkien Association had given the defendants any licence to occupy the said lands. The defendants have adduced evidence regarding the deed of transfer supporting their right to occupy the concerned portions on the said lands. On the other hand, the plaintiff stated they have no knowledge. Hence, the issue of whether the defendants' occupation of the concerned portions on the said lands is with the licence or consent of the predecessor in title becomes a triable issue.

A **[19]** Item 112 provides that for a suit for possession of immovable property or any interest not specifically provided for, the limitation period will be 12 years from the date the possession of the defendant becomes adverse to the plaintiff. Here, since the plaintiff counsel and the defendant counsel hold differing views as
B to the law applicable, in my view, it is a matter which is best argued at the trial proper.

[20] In the light of the reasons which I have elaborated, I conclude that there is no abuse of the court's process on the part
C of the plaintiff in instituting the originating summons as to warrant me to dismiss the action. I hereby order the originating summons to be converted into a writ action and all affidavits be treated as pleadings. Costs to follow the event.

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